Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JAMES F. GEORGE, III,

Petitioner,

v.

CITY OF MORRO BAY,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California
Second Appellate District, Division Six

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can a State Court apply the doctrine of res judicata, (based on a bankruptcy court order) to dismiss a complaint where respondents lacked standing to seek the order from the bankruptcy court?

Does "rejection" of a lease under § 365 deprive parties of their state law contract rights and rights guaranteed under the United States Constitution?

Does a bankruptcy court have jurisdiction to decide state law breach of contract issues between parties not involved in a bankruptcy case?

What is the meaning of "deemed rejected" as used in §365 of the Bankruptcy Code?

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PARTIES TO THE PROCEEDING

Petitioners

James F. George, III
Margie R. George
John George
James F. George, IV
Mary George

Petitioners, Pro Se

Respondent

City of Morro Bay

TABLE OF CONTENTS

Page

Questions Presented.....*i*

List Of Parties.....*ii*

Table Of Contents.....*iii*

Table Of Cited Authorities.....*v*

Table Of Appendices.....*ix*

Opinions Below.....1

Statement Of Jurisdiction.....1

Constitutional and Statutory Provisions Involved.....2

Statement Of The Case.....7

Background: Proceedings In The Bankruptcy Court.....8

Reasons For Granting The Writ.....13

I. Certiorari I s Warranted Because The City Lacked Standing To Request The Bankruptcy Court Order That Was The Basis Of The State Court's Ruling That The Complaints Were Barred By The Doctrine Of Res Judicata.....14

A. The Order Of The Bankruptcy Court Is Void Because The City Did Not Have Standing To Invoke The Court's Jurisdiction.....14

B. The Surrender Order Became Moot When The City Demanded And Accepted $155,000.00 To Treat The Lease As If It Had Not Been Rejected.....16

II. The Petition Should Be Granted Because Of The Profound Confusion In Both Federal and State Courts Over The Effect Of "Rejection" On Contracts And Leases.....17

III. The Ninth Circuit's Reading Of §365(d)(4) In Isolation Has The Effect Of Nullifying Other Provisions Of The Bankruptcy Code.....21

Conclusion.....24

TABLE OF CITED AUTHORITIES

Page

Federal Cases Cited:

Adarand Constructors, Inc. v. Mineta
122 S.Ct. 511, 514 (2001).....13

Anderson v. Elm Inn, Inc. (In re Elm Inn, Inc.)
942 F.2d 630, 634 (9th Cir. 1991) 13, 22, 23

Arizonans For Official English v. Arizona
117 S. Ct. 1055, 1069 fn. 23 (1997).....17

In re Austin Dev. Co.,
19 F.3d 1077, 1082-1083 (5th Cir. 1994).....18

G.I. Industries, Inc. v. Bendor Corp. (In re G.I. Ind.)
204 F.3d 1276, 1282 (9th Cir. 2000).....19, 20

Granfinanciera, S.A. v. Nordberg,
492 U.S. 31, 51-52, 109 S.Ct. 2782, 2795 (1989)....23

In re Bergt, 241 B.R. 17 (Bkrtcy. D. Alaska 1999).....18

In re George, 177 F.3d 885 (9th Cir.1999).....12
Cert. Denied. 120 S.Ct. 978 (2000).....13

In re George, 185 F.3d 866 (9th Cir. 1999).....12

In re Lavigne, 114 F.3d 379, 386-387 (2d Cir. 1997).....18

In re Lovitt, 757 F.2d 1035 (9th Cir. 1985).....21

Page

In re Mirant Corp.,
378 F.3d 511, 522 (5th Cir. 2004)..... 22

In re Modern Textiles, Inc.,
900 F.2d 1184, 1191 (8th Cir 1990).....18, 19

Lewis v. Casey, 116 S. Ct. 2174, 2179 fn.1 (1996).....16

Matter of Continental Airlines,
981 F.2d 1450, 1460 (5th Cir. 1993).....18

Northern Pipeline Construction Co. v.
Marathon Pipe Line Co.
456 U.S. 50, 71, 102 S.Ct. 2858, 2871 (1982).....23

Orion Pictures Corporation v.
Showtime Networks, Inc. (In re Orion),
4 F.3d 1095 (2nd Cir. 1993).....19, 20

Steel Co. v. Citizens For A Better Environment,
118 S.Ct. 1003, 1016 (1998).....15

TRW, Inc. v Andrews,
534 U.S. 19, 28, 122 S.Ct. 441 (2001).....22

Valley Forge Christian College v.
Americans For Separation Of Church And State, Inc.,
454 U.S. 464, 483, 102 S. Ct. 752, 763-64 (1982).....15

Waste Management of North America v.
Weinberger, 862 F.2d 1393 (9th Cir. 1988).....16

Page

State Cases Cited:

C.H.E.G., Inc. v. Millennium Bank,
99 Cal App.4th 505 (Cal. App. 1 Dist. 2002).....20

Kolschefsky v. Harris,
72 P.3d 1144, 1148, fn 1(Wyo. 2003).....17

Mayfield Smithson Enterprises v. Com-Quip,
896 P.2d 1156, 1162, fn. 6 (N.M. 1995).....17

McLaughlin v. Walnut Properties, Inc.,
14 Cal. Rptr.3d 369 (Cal. App. 2 Dist. 2004).....20

Syufy Enterprises v. City of Oakland,
104 Cal. App. 4th at 882-883,
128 Cal. Rptr.2d 808 (Cal. App. 1 Dist.2002).....20

Valley Investments, L.P. v.
BancAmerica Commercial Corp.,
106 Cal. Rptr.2d 689,
88 Cal. App.4th 816, 829-830.....20

United States Constitution:

Article I, § 2.....2

Fifth Amendment.....3, 14

Statutes Cited:

11 U.S.C. §362(b)(10).....3,21

11 U.S.C. §362(c)(1).....3

Page

11 U.S.C. §365(d)(4).....passim

11 U.S.C. §365(g)(1).....4, 19

11 U.S.C. §541(b)(2).....5, 21

28 U.S.C. §1257(a).....1

Federal Rules of Bankruptcy Procedure:

Rule 6006(b).....6, 10, 12

Page

APPENDIX CONTENTS

Order Of The Court Of Appeal Of The State Of California, Second Appellate District, Division Six. Unpublished. Filed November 11, 2004.....App. 1

Judgment Of The Superior Court Of The State Of California, County Of San Luis Obispo. Filed June 10, 2003.....App. 15

Order Sustaining Defendant City Of Morro Bay's Demurrers Without Leave To Amend. Filed March 20, 2003.....App. 17

Supreme Court Of California En Banc Order Denying Petition For Review. Filed February 16, 2005.....App. 20

Memorandum Of The United States Court Of Appeals For The Ninth Circuit. Unpublished Filed May 24, 1999.....App. 21

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of the State of California, Second Appellate District, Division Six. The California Supreme Court denied the Petition for Review in this case.

OPINIONS BELOW

The San Luis Obispo County superior court's order (per Tangeman, J.) sustaining respondent City of Morro Bay's demurrer without leave to amend (Appendix ("App.") 17-19) was entered on March 20, 2003. The Judgment (App. 15-16) was entered by the court on June 10, 2003. The court of appeals' order (per Perren, J., with Gilbert, P.J. and Yegan, J. concurring) (App. 1-14) affirming the judgment of the superior court is unpublished. The California Supreme Court (en banc) denied a Petition for Review (App. 20).

STATEMENT OF JURISDICTION

The Court of Appeals of the State of California, Second Appellate District, Division Six entered its order affirming the judgment of the San Luis Obispo County superior court on November 15, 2004. The California Supreme Court (en banc) denied a Petition for Review on February 16, 2005. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves the following Constitutional and Statutory provisions:

United States Constitution:

Article III, section 2 which provides:

> Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between a state, or the citizens thereof, and foreign states, citizens, or subjects.

Article VI, section 3 provides:

> Section 3. The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Amendment V which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offenses to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutory Provisions:

11 U.S.C. § 362(b)(10) provides:

> (b) The filing of a petition under section 301, 302, or 303 of this title, or an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--
>
> (10) under section (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property.

11 U.S.C. § 362(c) provides:

> (c) Except as provided in subsections (d), (e), and (f) of this section--
>
> (1) the stay of an act against property of the

estate under subsection (a) of this section continues until such property is no longer property of the estate;

11 U.S.C. § 365(d)(4) provides:

(4) Notwithstanding paragraphs (1) and (2) in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(g) provides:

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease -

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under Chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition;

11 U.S.C. 525(a) provides:

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved

July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. §541(b)(2) provides:

(b) Property of the estate does not include -

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

11 U.S.C. §1101(1) provides:

(1) "debtor in possession" means debtor except when a person that has qualified under section 322

of this title is serving as trustee in the case;

28 U.S.C. § 2075 provides:

§ 2075. Bankruptcy rules.

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedures in cases under Title 11.

Such rules shall not abridge, enlarge, or modify any substantive right.

Federal Rules of Bankruptcy Procedure:

Rule 6006 provides:

(a) Proceeding to Assume, Reject, or Assign.
A proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014.

(b) Proceeding to Require Trustee to Act.
A proceeding by a party to an executory contract or unexpired lease in a chapter 9 municipality case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual's debt adjustment case, to require the trustee, debtor in possession, or debtor to determine whether to assume or reject the contract or lease is governed by Rule 9014.

Rule 7070 provides:

Rule 70 F.R.Civ.P. applies in adversary proceedings

and the court may enter a judgment divesting the title of any party and vesting title in others whenever the real or personal property involved is within the jurisdiction of the court.

STATEMENT OF THE CASE

Petitioners filed complaints in the Superior Court of San Luis Obispo County against the City of Morro Bay for Breach of Contract, Inverse Condemnation, Breach of the Covenant of Good Faith and Fair Dealing, Intentional Interference with Performance of Contract and Breach of Third Party Beneficiary Contract, and Declaratory Relief.

Respondent City of Morro Bay filed demurrers to the complaints, arguing that petitioners "are barred by the doctrine of res judicata and/or collateral estoppel from asserting their claims because the factual and legal basis for the claims had been adjudicated against them in the course of the bankruptcy proceedings and other state court actions filed in this court" and that any remaining claims were barred for failure to file a timely government tort claim (App. 18).

The superior court consolidated the cases and held that the "Bankruptcy Court determined that Plaintiffs failed to assume the lease for the subject property after Plaintiffs had filed for bankruptcy, as required by 11 U.S.C. §365(d)(4)." (App. 18). The court further found that the claims asserted are barred:

> "because the underlying facts and legal points have previously been determined in the City's favor. Further, to the extent the issues raised by the tort claims (the Second Cause of Action for Conversion and the Forth Cause of Action for Interference with Performance of Contract) were not resolved in the various underlying State and

> Federal proceedings, they are barred because of Plaintiffs' failure to submit timely tort claims."

(App. 19). On appeal, the City conceded that the failure to submit timely tort claims was inapplicable in this case, and did not pursue that argument on appeal. (App. 5, n.2).

In an unpublished opinion the court of appeals affirmed the judgment of the superior court sustaining respondent's demurrers on the ground that the doctrine of res judicata "precludes the claims alleged in the complaints because recovery under any of the claims necessarily requires re-litigation of issues adjudicated to finality by the bankruptcy court." (App. 1-2).

On the declaratory relief claim, the appellate court found that "[t]here was no factual basis to support petitioners' legal conclusion that the settlement agreement entered into by the City and petitioners' lender reinstated appellants' possessory interest in the Lease or had any effect on the Order or appellants' rights against the City." (App. 13).

Petitioners filed a Petition for Review with the California Supreme Court, which was denied. (App. 20).

This petition for a writ of certiorari follows because it involves a state court's determination of the effect of a bankruptcy court order on state law breach of contract and tort causes of action.

BACKGROUND: PROCEEDINGS IN BANKRUPTCY COURT

In 1987 James F. George, III, and Margie R. George entered into a lease with the City of Morro Bay. The lease was for three ground and water Tidelands Trust lease sites. The stated term of the lease was for thirty

(30) years and contained a provision for an additional twenty (20) years under a first right of refusal. The lease commenced on July 1, 1987 and ends on June 30, 2017.

The Georges, with the help of their grown children, John George, James F. George, IV, and Mary George, constructed improvements on the lease sites as required by the lease. Petitioners spent in excess of $500,000.00 developing the lease sites and repairing the seawall, which sum does not include their thousands of hours of labor. All improvements were constructed at no cost or expense to the City. The George children assisted their parents with labor and financial support in building the improvements on the lease sites. The lease provides that the Georges are the owner of the improvements constructed on the lease sites. The lease was appraised in June, 1994 for $875,000.00, not including the value of the businesses operated thereon.

The Georges were required to maintain the improvements and the seawall at their own expense and to build and maintain public restroom. The City incurred no expense with either the building or the maintenance of the improvements. The City had no executory obligations to the Georges in connection with the lease.

In 1993, the George parents assigned a forty percent (40 %) interest in the lease to their children in recognition of their assistance in building the improvements and for their help in establishing the businesses thereon. (App. 2.)

On June 7, 1994 the George parents filed a Chapter 11[1] reorganization petition and operated the lease sites and

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[1] All statutory references are to the Bankruptcy Code (11 U.S.C. § 101 et seq.) unless otherwise noted.

their businesses thereon as debtors in possession. The Georges' children were not parties to the bankruptcy petition.

The Georges, as debtors' in possession did not file a formal motion to assume the lease within sixty days of the order for relief pursuant to §365(d)(4). They believed that in Chapter 11 reorganization proceedings, the lease could be assumed in their Plan of Reorganization. (See Rule 6006(b), page 6 supra.)

On September 30, 1994 the City Manager, without relief from the automatic stay or any order from any court, had the Harbor Director deliver a letter to the Georges at the lease sites demanding immediate surrender of the property to the City. The letter stated that the demand was being made pursuant to § 365(d)(4).

The Georges did not surrender the property to the City, and on November 1, 1994 filed their Reorganization Plan. The plan specifically provided for the assumption of the lease.

At the time the City demanded the surrender of the property the City had not been injured in any way by the petitioners' failure to file a formal motion to assume the lease. Petitioners were at all times in full compliance with all the terms and conditions of the lease. The rent was fully paid in advance and the City held a substantial security deposit.

On November 15, 1994 the City filed a Motion for Surrender Order of Non-Residential Real Property with the bankruptcy court.

The Georges filed a motion to assume the unexpired lease "if applicable". The bankruptcy court consolidated the

hearings on the motions and granted the City's motion and denied the Georges' motion to assume the lease by an order entered on February 1, 1995.

The Georges appealed the order to the district court. While the appeal was pending the City filed an Unlawful Detainer Complaint in San Luis Obispo County Superior Court. The Complaint, filed June 23, 1995, named Mary George, James F. George, IV, James F. George, III, and Margie R. George. The Complaint did not name John George. The City cited the "deemed rejection" of the lease as the basis for the action. The City stated in their complaint that the City "contends that the deemed rejection was a termination of the lease by operation of law.' They further stated that the termination of the lease was not the result of a default under the lease. The City had never requested relief from the automatic stay and the State Court rejected our argument that the City was required to obtain relief from the automatic stay before taking any action against the debtors or the debtors' estate in bankruptcy.

The district court remanded to the bankruptcy court to determine if the City had "evidenced an intent to treat the lease as continuing rather than terminated."

After the district court remand, the City entered into a "Settlement Agreement" with the Georges' lender whereby the bank would pay the City $155,000.00 to treat the lease "as if the lease were not terminated by the deemed rejection in the bankruptcy proceedings of James F. George, III and Margie R. George."

On October 27, 1995 the bank paid the City $155,000.00 from the estate's equity in the lease. Attached to the check was the statement, "[s]ettlement agreement costs for

reinstatement of lease (emphasis added). The bank added the $155,000.00 to the debtors' loan balance without approval of the bankruptcy court.

Thereafter, without informing the bankruptcy court of the settlement agreement with the Georges' lender, the City renewed their request for a surrender order. When informed of the settlement agreement by the Georges, the bankruptcy court refused to consider any action by the City that took place after the December 21, 1994 hearing on the original motion filed by the City. The bankruptcy court again entered an order that the Georges had to surrender the property to the lessor (City) because the Georges had not filed a formal motion to assume the lease. The court held that Federal Rules of Bankruptcy Procedure Rule 6006 required that a "motion" was required to assume the lease. On April 15, 1996 the bankruptcy court entered another "surrender order" which also stated that "anyone holding under or through the Georges" were required to immediately surrender possession of the property to the City.

The Georges did not surrender the property and on August 1, 1996, without having obtained relief from the automatic stay, the City had all the Georges evicted from the property. The City seized the buildings and equipment that was the property of the estate.

The Georges again appealed to the district court and then to the Ninth Circuit. The Ninth Circuit, in a published opinion (*In re George,* 177 F.3d 885 (9th Cir. 1999)), affirmed the bankruptcy court's order. In an unpublished Memorandum (*In re George,* 185 F.3d 866 (9th Cir. 1999)) the court addressed petitioners' argument that the City lacked standing to seek the surrender order by stating:

"The Georges also argue that the City does not

> have standing to bring a motion for surrender of the property because it did not suffer any harm. This argument fails for two reasons. First, this circuit has expressly determined in the context of Section 365(d)(4) rejections that it is appropriate for lessors to bring actions for surrender orders within the bankruptcy case. *See Anderson v. Elm Inn, Inc.* (*In re Elm Inn*), 942 F.2d 630, 634 (9th Cir. 1991). Second, the City as the lessor of the property has a substantial interest in having appellants removed from the leasehold so it can find new tenants." App. 23.

For ease of reference, the unpublished Memorandum of the Ninth Circuit is reproduced in the Appendix at page 21-24.

Petitioners James F. George, III and Margie R. George filed a Petition for Certiorari to this Court which was denied. *James F. George, III, et ux., v. City of Morro Bay,* (120 S. Ct. 978 (2000).

REASONS FOR GRANTING THE WRIT

The petition should be granted for three reasons. *First*, this Court has held that, "[w]e are obliged to examine standing *sua sponte* where standing has erroneously been assumed below." "If the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it." *Adarand Constructors, Inc. v. Mineta,* 122 S. Ct. 511, 514 (2001) (internal citations omitted). The Ninth Circuit's ruling that the City had "standing" to request a surrender order, even though "it did not suffer any harm" is in direct conflict with the United States Constitution, numerous decisions of *this* Court and decisions in *every* Circuit.

Second, review should be granted because of the profound confusion surrounding the meaning of the term "deemed rejected" and the effect on state law property rights. The Ninth Circuit's ruling in the Georges' bankruptcy case is in direct conflict with another Ninth Circuit decision and decisions of the Second, Fifth, and Eighth Circuits. In addition, the unpublished decision of the state court of appeals in this case is in direct conflict with the published opinions of other California Courts of Appeal.

Third, the Ninth Circuit's reading of §365(d)(4) in isolation has the effect of nullifying other provisions of the Bankruptcy Code as enacted by Congress and has deprived these petitioners of the protections afforded by those statutes *and* the Fifth Amendment to the United States Constitution.

I. Certiorari Is Warranted Because The City Lacked Standing To Request The Bankruptcy Court Order That Was The Basis Of The State Court's Ruling That The Complaints Were Barred By The Doctrine Of Res Judicata.

The State Court of Appeals Affirmed the dismissal of the complaints following the sustaining of demurrers on the ground that they were barred by the doctrine of res judicata. The court concluded that this doctrine precluded the claims alleged in the complaints because recovery under any of the claims necessarily required relitigation of issues adjudicated to finality by the bankruptcy court. (App. 1-2).

A. The Order Of The Bankruptcy Court Is Void Because The City Did Not Have Standing To Invoke The Court's Jurisdiction.

Both the State Court of Appeals and the Federal Courts failed to recognize that this Court has repeatedly held that

a party invoking the court's jurisdiction must have standing. In *Steel Co. v. Citizens For A Better Environment,* 118 S.Ct. 1003, 1016 (1998) this court stated that the "irreducible constitutional minimum of standing contains three requirements. First and foremost, there must be alleged and ultimately proven that an injury in fact has occurred; that a harm has been suffered that is 'concrete', 'actual or imminent', and not 'conjectural or hypothetical'" (internal citations omitted). Standing is essential to establish the court's jurisdiction and without jurisdiction the court is powerless to act.

The Ninth Circuit's memorandum avoids petitioners argument that the City lacked standing because "it did not suffer any harm". Instead it states that, "[t]his argument fails for two reasons. First, this circuit has expressly determined in the context of Section 365(d)(4) rejections that it is appropriate for lessors to bring actions for surrender orders within the bankruptcy case." (App. 23) This statement blatantly ignores the dictates of this court and deprives these petitioners of fundamental Constitutional protections. While it may be appropriate for a lessor to bring an action for a surrender order within the bankruptcy court *if they have been injured*, it cannot provide standing for any party that has not sustained an injury. The party invoking the court's jurisdiction has the burden of establishing its existence. 118 S.Ct. at 1017 "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception'" 118 S.Ct. at 1012 (Citations omitted).

This court held in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* 454 U.S. 464, 483-83, 102 S. Ct. 752, 763-64 (1982) that absent *injury*, a violation of statute gives rise merely to a

generalized grievance but not standing. This holding was followed by the Ninth Circuit in *Waste Management of North America v. Weinberger*, 862 F.2d 1393 (9th Cir. 1988).

Without jurisdiction, federal courts are powerless to act. "Standing, which is jurisdictional, is not subject to waiver." *Lewis v. Casey,* 116 S.Ct. 2174, 2179 fn. 1 (1996) (citations omitted). Orders entered without jurisdiction are void.

The bankruptcy court should have been alert to the duty to determine the jurisdictional issue before granting the City a surrender order. This is especially pertinent given the fact that the City never alleged that it has been injured, and in fact asserted to the court numerous times that the Georges were not in breach of the lease.

B. The Surrender Order Became Moot When The City Demanded And Accepted $155,000.00 To Treat The Lease As If It Had Not Been Rejected.

Even if the City had sustained an injury by the deemed rejection, (which they had not), the Settlement Agreement rendered the Surrender Order Moot. This agreement entered into by the City and the Bank, whereby the City demanded and accepted the $155.000.00 from the bank, expressly stated that the payment was made in exchange for and in consideration of the City's agreement to treat the lease as "not terminated by the deemed rejection in the bankruptcy case of James F. George, III and Margie R. George." Not only did the City not have an injury, it received a windfall because $75,000.00 of that sum was for "further legal costs associated with the Lease Sites, and *for any other purpose that the City of Morro Bay deems appropriate."* Another $35,000.00 was for "unpaid rent" when in reality there was no rent owing on the premises. At the time the City requested

the surrender order, the rent was paid through the end of the year (1994). In addition, the City began seizing the rent from a subtenant of the Georges from October, 1994 through the time it entered into the agreement with the bank. This rent from the subtenant more than covered the rent as stated in the lease. The City applied the subtenant's payments to the lease. Therefore, the $35,000.00 from the bank amounted to the City getting more than double the rent due under the lease.

The Ninth Circuit ignored petitioners argument that, "[i]t is the duty of counsel to bring to the federal tribunal's attention, *'without delay,'* facts that may raise a question of mootness" (citation omitted). *Arizonans For Official English v. Arizona,* 117 S.Ct. 1055, 1069 fn. 23. (1997). Instead of being forthcoming with the court, the City continued to mislead the court by stating that the lease had been terminated.

II. The Petition Should Be Granted Because Of The Profound Confusion In Both Federal And State Courts Over The Effect Of "Rejection" On Contracts And Leases.

Chief Justice Hill of the Wyoming Supreme Court stated, "[c]onstruing, or deciphering, a statute such as 11 U.S.C. §365 is a daunting task." *Kolschefsky v. Harris,* 72 P.3d 1144. 11148, fn. 1 (Wyo. 2003).

In the case of *Mayfield Smithson Enterprises v. Com-Quip,* 896 P.2d 1156, 1162 fn. 6 (N.M. 1995) the Supreme Court of New Mexico recognized that, "[t]here is disagreement among the federal circuits about whether rejection of a lease pursuant to 11 U.S.C § 365 serves to terminate the lease."

Herbert A. Ross, an Alaska bankruptcy judge, authored a nineteen (19) page opinion in an effort to make some sense of § 365. *In re Bergt,* 241 B.R. 17 (Bkrtcy. D.Alaska, 1999). He, like many other courts, rely heavily on three law review articles written by Professor Michael T. Andrew (*Executory Contracts in Bankruptcy: Understanding 'Rejection'*, 59 U. Colo. L. Rev. 845 (1988), and *Executory Contracts Revisited: A Reply to Professor Westbrook,* 62 U. Colo. L. Rev. 1 (1991)), and by Professor Jay Lawerence Westbrook (*A Functional Analysis of Executory Contracts,* 74 Minn. L. Rev. 227 (1989). The three law review articles total 198 pages.

One of the things these two professors agreed on was that "bankruptcy is that volume of law that might have been written by Lewis Carrol. . . .[and] [i]n no chapter of that volume has the law become more psychedelic than the one titled 'executory contracts.'

The essence of their combined 198 pages, and the point they both agree on is that "rejection does not cancel, repudiate, or terminate contracts;. . .and that rejection does not, like bankruptcy law's 'avoiding powers,' terminate state-law rights in or to specific property."

This approach has been followed by the Second and Fifth Circuits. See: *In re Lavigne),* 114 F.3d 379, 386-387 (2d Cir. 1997); *In re Austin Dev. Co.,* 19 F.3d 1077, 1082-1083 (5th Cir. 1994).

In the case of *Matter of Continental Airlines,* 981 F.2d 1450 , 1460 (5th Cir. 1993), the Fifth Circuit followed the holding of the Eighth Circuit case, *In re Modern Textiles, Inc.,* 900 F.2d 1184, (8th Cir. 1990) wherein the Eighth Circuit addressed the argument that rejection of a lease under 11 U.S.C. §365 terminated the debtor's obligations

on the lease. The court cited the language of 11 U.S.C. §§ 365, 365(g)(1) and 502(g) in support of its conclusion that the "trustee's rejection of the lease operate[d] as a breach of an existing and continuing legal obligation of the debtor, not as a discharge or extinction of the obligation itself. *Modern Textiles,* 900 F.2d at 1191."

The Ninth Circuit has found that a motion to assume or reject is a summary proceeding and not on the *merits*. In following *Orion Pictures Corporation v. Showtime Networks, Inc.* (*In re Orion*), 4 F.3d 1095 (2nd Cir. 1993), they stated:

> "*Orion* correctly recognizes that adjudicating the validity of a contract at the time of rejection would turn a summary proceeding into a full trial *on the merits*, a result that would be *inconsistent* with the procedures found in the Bankruptcy Code. Instead, our approach gives effect to the plain language of the Bankruptcy Code and allows a bankruptcy judge to postpone consideration of the validity of a contract until a full adversary proceeding can take place. This approach better conforms with the structure of the code."
> (Emphasis added.)

G.I. Industries, Inc. v. Benedor Corp. (*In re G.I. Industries, Inc.*, 204 F.3d 1276, 1282 (9th Cir. 2000).

The Second Circuit held in *Orion* that "the bankruptcy court's "business judgment" in deciding a motion to assume is just that - a judgment of the sort a businessman would make. In no way is this decision a formal ruling on the underlying disputed issues, and thus will receive no collateral estoppel effect." *Orion* at 1099.

It is difficult to understand how the state court could find that petitioners complaints are barred by the doctrine of

res judicata if the decisions of the Ninth Circuit in *G.I. Industries,* and the Second Circuit in *Orion* are correct.

It is also difficult to understand how the state court of appeal was able to decide the issue directly opposite to three *published* opinions in the state.

A panel in Division Eight of the Second Appellate District decided that the rejection of the debtor's ground lease did not terminate the lease, stating that the *plain language* of the bankruptcy statute used the terms 'breach" and "termination" as if they had different meanings and directly provided that rejection of a lease was a breach. *McLaughlin v. Walnut Properties, Inc.*, 14 Cal. Rptr.3d 369 (Cal.App. 2 Dist. 2004). That court also held that a lessor can waive a debtor-lessee's rejection under 365(d)(4) through such post-rejection conduct as accepting rent. (*Id.* at 376).

The *McLaughlin* court found that "California courts have recognized that the *Austin* line of cases represents the *emerging view* of the federal bankruptcy courts, even in the Ninth Circuit, which had previously held that a lease is terminated by the rejection under section 365." (*Id.* at 375.) (Referring to the Fifth Circuit decision in *In re Austin Development , supra.*) They join with *Syufy Enterprises v. City of Oakland,* 104 Cal. App.4th at pp. 882-883, 128 Cal. Rptr.2d 808 (Cal. App. 1 Dist. 2002) and *Valley Investments, L.P. v. BancAmerica Commercial Corp.*, 106 Cal. Rptr.2d 689, 88 Cal. App.4th 816, 829-830 in holding that rejection does not terminate the lease.

Another California Court of Appeals also held that rejection does not terminate the lease completely so as to divest the lessee of his or her estate in the property. *C.H.E.G., Inc. v Millennium Bank,* 99 Cal. App.4th 505 (Cal. App. 1 Dist. 2002)

Each of the California cases cited above cites to numerous other cases, which attest to the "profusion of confusion" that exists over "rejection." This court should grant this petition for certiorari to settle once and for all exactly what effect rejection has on the state-law rights of the parties to leases and contracts.

III. The Ninth Circuit's Reading Of § 365(d)(4) In Isolation Has The Effect of Nullifying Other Provisions Of The Bankruptcy Code.

Prior to the enactment of the 1984 Bankruptcy Amendments and Federal Judgeship Act of 1984, it was the practice in the Ninth Circuit that contracts and unexpired leases did not come into the estate until affirmatively assumed by the trustee. *In re Lovitt,* 757 F.2d 1035 (9th Cir. 1985) held that , "executory contracts and leases -- unlike all other assets -- do not vest in the trustee as of the date of the filing of the bankruptcy petition. They vest only upon the trustee's timely and affirmative act of assumption" and "[b]ecause rejection of an executory contract is retroactive to the date of the filing of the bankruptcy petition, such a contract never becomes a part of the bankruptcy estate.. . . A bankruptcy court has no jurisdiction over assets outside of the bankruptcy estate, and therefore lacks authority to approve their transfer." (Citations omitted.) *Id.* at 1041.

Subtitle C of The Bankruptcy Amendments And Federal Judgeship Act Of 1984, entitled "Leasehold Management Bankruptcy Amendments Act of 1983" changed that by amending sections 365, 541 and 362. Among the changes were the additions of § 365(d)(4) and amendments to section 541(b)(1) and (b)(2) and adding section 362(b)(9) which is section 362(b)(10) in the present code. Sections 362(b)(10) and 541(b)(2) provide that any interest of a debtor as lessee

of nonresidential real property that has terminated at the expiration of the *stated term* of the lease, either before the commencement of or during a case under Title 11 would not be included in property of the estate, nor would it be protected by the automatic stay.

By excluding *only* those leases, it is clear that Congress intended that all other *unexpired leases* would be property of the estate and protected by the automatic stay. The Fifth Circuit has cited *TRW, Inc. v. Andrews* , 534 U.S. 19, 28, 122 S.Ct. 441, 447 (2001) for the proposition that "where Congress includes specific exceptions to a statute, additional exceptions should not be implied.) *In re Mirant Corp.* 378 F.3d 511, at 522 (5th Cir. 2004).

The Ninth Circuit specifically cited *In re Elm Inn, Inc.*, 942 F.2d 636 (9th Cir. 1991) for the proposition that it was appropriate for lessors to "bring actions for surrender orders" within the bankruptcy case. (App. 23.) However, *Elm Inn* makes no mention of the requirement that a lessor is required to obtain relief from the automatic stay if the *stated term of the lease* has not expired. Furthermore, there is no discussion of standing in that case.

What *Elm Inn* expressly determined was that the case should be remanded to determine whether Paratore or Elm Inn, Inc. (the debtor) held the leasehold interest. The court stated, "[n]o legal argument in the world can help the Andersons in this action if the leasehold was never an asset subject to the bankruptcy. Similarly, *if the debtor's interest in the lease is only partial,* no surrender order can issue without a prior factual determination of the extent of that partial interest. (Emphasis added.)

In petitioners' case the court expressly discussed the interest of third parties to the lease (App. 24). They named

the parties that would be adversely affected by the surrender order. Therefore, they failed to abide by their own precedent. What is more interesting, is that the debtor in *Elm Inn* had made a motion to assume the lease within the sixty-day period of §365(d)(4) and the bankruptcy court denied the motion.

Finally, the court agreed with the district court that the matter was a "core bankruptcy matter" for which there is no right to a state court trial or jury. (App. 24.) This finding flies in the face of this Court's decisions in *Granfinanciera, S.A. v. Nordberg,* 492 U.S 31, 51-52, 109 S.Ct. 2782 , 2795 (1989) where this Court held that Congress "lacks the power to strip parties contesting maters of private right of their constitutional right to a trial by jury." And in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 456 U.S. 50, 71, 102 S. Ct.2858, 2871 (1982) this Court held, "[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created rights, such as the right to recover contract damages that is the issue in this case. The former may well be a 'public right' but the latter obviously is not."

In this case the most fundamental policies underlying the Bankruptcy Code: the recognized policies of preserving going concerns and maximizing property available to satisfy creditors, have been defeated by the failure of the courts to understand this truly ambiguous statute. The City, which in reality was an un-secured creditor was able to walk away with the *entire value of the estate* while even fully secured creditors received absolutely nothing.

The conflicting decisions of the circuit courts, the state courts and numerous lower federal courts underscore the need for plenary review by this Court to clarify the effect

of rejection on state law contract rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Filed 11/15/04 George v. City of Morro Bay CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL RECORDS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

James F. George, III, et al,	)	2d Civil No. B169180
	)	(Super. Ct. No. 81219)
Plaintiffs and Appellants,	)	(San Luis Obispo County)
	)	
v.	)	
	)	
City of Morro Bay,	)	
	)	
Defendant and Respondent.	)	
	)	
John George, et al,	)	2d Civil No. B169264
	)	(Super. Ct. No. 81221)
Plaintiffs and Appellants,	)	
	)	
v.	)	
	)	
City of Morro Bay,	)	
	)	
Defendant and Respondent.	)	
	)	

Appellants appeal the judgment of dismissal following the sustaining of demurrers on the ground that their complaints were barred by the doctrine of res judicata. We conclude that this doctrine precludes the claims alleged in the complaints because recovery under any of the

claims necessarily requires relitigation of issues adjudicated to finality by the bankruptcy court. We affirm.

Appellants James F. George, III and Margie George (Georges) leased commercial property from the City of Morro Bay (City). They assigned a percentage interest in the leasehold to their adult children, appellants John George, James F. George, IV and Mary George (George children). After the Georges filed for bankruptcy, the bankruptcy court deemed the lease rejected and the City took possession of the leased property. (11 U.S.C. § 365(d)(4).)[1]

After the lease was deemed rejected, the Georges and the George children filed separate complaints against the City seeking damages based on alleged misconduct by the City as landlord. The trial court sustained demurrers by the City to both complaints without leave to amend. The court ruled that the complaints were barred by the res jusicata effect of the order by the bankruptcy court that the lease had been rejected.

The Georges and George children separately appealed the dismissal of their complaints, contending that the doctrine of res jusicata does not bar their state causes of action. We consolidated the appeals for purposes of disposition because they involve essentially the same issues and parties.

Facts and Procedural History

In 1987, the Georges became tenants of the City under

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[1] All statutory references are to the Bankruptcy Code unless otherwise noted.

a lease of waterfront commercial property (Lease). In accordance with the Lease, the Georges constructed improvements on the leased property, including pierage and dock facilities for the benefit of the public. In 1993, the Georges assigned a percentage interest in the Lease and businesses operated on the leased property to the George children.

In June 1994, the Georges filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. (11 U.S.C.) Shortly thereafter the Georges paid three months of past due rent and were current in rent payments for a period of time. The proceeding was converted to a Chapter 7 in 1995. When the Georges failed to assume or reject the Lease within 60 days as required by the Bankruptcy Code, the City filed a motion to deem the Lease rejected and to obtain possession of the property. (§ 365(d)(4).) In response, the Georges filed a motion to assume the Lease arguing that the City had waived its right to seek a deemed rejected order.

On February 1, 1995, the bankruptcy court granted the City's motion and denied the Georges' motion. The bankruptcy court ruled that "the lease was rejected as a matter of law," and ordered the Georges "to relinquish possession of the [leased property] immediately to the CITY OF MORRO BAY . . . ." The court also found that "[t]here was no inequitable activity" by the City "in the handling of this matter." The Georges appealed, and the federal district court remanded the case for further findings on whether the City waived its rights to possession by accepting rent from the Georges after the Lease had been deemed rejected.

In an order entered on April 15, 1996 (the Order), the bankruptcy court made further factual findings and

orders. The court found that the City accepted rent without knowledge of the Georges' failure to file a timely motion to assume the Lease, and did not otherwise waive its rights under section 365(d)(4). The court restated its determination initially made in the February 1, 1995, order that the Lease was deemed rejected and that the Georges had to immediately surrender possession of the Lease property to the City. The court expressly ruled that the surrender order applied to the George children because they claimed possession of the leased property "under or through" the Georges and had notice of the bankruptcy proceedings.

The Georges appealed the Order to the district court and the Ninth Circuit. The Ninth Circuit affirmed in a published decision. (*In re George* (9th Cir. 1999) 177 F.3d 885.) In addition, the Ninth Circuit issued two unpublished opinions rejecting specific claims by the Georges in their appeal. (*In re George* (9th Cir. May 24, 1999) 185 F.3d 866 [1999 WL 387070 & WL 387082].)

In 1996, the Georges filed an adversary proceeding in the bankruptcy case alleging a variety of federal and pendant state claims against the City, including federal claims for an unlawful taking of the leased property, violation of the Georges' civil rights (42 U.S.C. § 1983), and conspiracy to violate the Georges' right to assume the Lease. The bankruptcy court dismissed all but one federal claim and all the state law claims. The dismissal was with prejudice as to the federal claims but without prejudice as to the state claims. (*In re George* (9th Cir. 2003) 322 F.3d 586.)

In September and October 1997, appellants filed their complaints and first amended complaints against the City (complaints) commencing the instant state court actions.

Both actions were stayed due to the pendency of the bankruptcy proceedings.

In September 1997, the George children also filed a complaint against the County of San Luis Obispo alleging wrongful eviction in violation of state unlawful detainer law, inverse condemnation, and violation of civil rights. We affirmed a summary judgment in favor of the County in that case, concluding that unlawful detainer law did not apply and that the Order was binding on the George children as well as the Georges. (*George v. County of San Luis Obispo* (2000) 78 Cal. App. 4th 1048.)

After the stay of the instant case was lifted in October 2002, the City filed demurrers to the complaints. The demurrers asserted that the alleged causes of action were all precluded by the res judicata effect of the bankruptcy court's termination of appellants' possessory interest under the Lease.[2] The trial court sustained the demurrers without leave to amend. The court stated that "the claims asserted in these lawsuits are barred by res judicata and/or collateral estoppel, because the underlying facts and legal points have previously been determined in the City's favor" by the bankruptcy court.

Allegations of Complaint

The complaints allege four causes of action for damages and one cause of action for declaratory relief. The first cause of action for "Breach of Contract and Statutory Duty" concerns the tidelands trust doctrine

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2 The demurrers also argued that the complaints were barred by the failure to comply with the California Tort Claims Act, but this argument has not been pursued on appeal.

whereby the state's tideland areas are held in trust for public use. The cause of action alleges that the City violated its duties under the doctrine by treating appellants differently from other tenants in the commercial center.

The second cause of action for "Trespass, Conversion and Inverse Condemnation" alleges that the City interfered with appellants' leasehold interest by collecting rent from a subtenant between September 1994 and August 1996. The third cause of action for "Breach of Implied Covenant of Good Faith and Fair Dealing" alleges that the City acted for its own financial gain in taking possession of the leased property.

The fourth cause of action for "Intentional Interference with Performance of Contract and Breach of Third Party Beneficiary Contract" alleges that the City pursued litigation to evict the Georges from the leased property, changed public records to reflect that the City "held" the leasehold, and collected rent from a subtenant. The cause of action also alleges that the Lease was "reinstated" by and October 1995 agreement between the City and the Georges' lender that settled the City's lawsuit to enjoin foreclosure of the lender's security interest in the Lease. The fifth cause of action seeks a declaration by the court that the Lease was reinstated by the agreement between the City and the lender.

Discussion

Standard of Review

In reviewing an order sustaining a demurrer, we independently review the complaint to determine whether the facts alleged state causes of action under any possible

legal theory. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal. 4th 962, 967; *Satten v. Webb* (2002) 99 Cal. App.4th 365, 374-375.) We give the complaint a reasonable interpretation, and treat all properly pleaded facts as true. (*Aubry*, at pp. 966-967.) In this case we also consider the orders of the bankruptcy court in the George bankruptcy. (*Satten*, at p. 376.) If the plaintiff demonstrates a reasonable possibility the complaint can be cured by amendment, it is an abuse of discretion for the trial court to sustain the demurrer without leave to amend. (*Aubry*, at p. 967.)

Complaints Barred by Bankruptcy Court Orders

Appellants contend that the state law claims alleged in the complaints are not precluded because there was no final judgment in the bankruptcy court adjudicating the substantive rights of the parties relevant to the complaints. Appellants also argue that the claims alleged in the complaints can be pursued because the bankruptcy court dismissed the state law claims alleged in the adversary proceeding without prejudice. We disagree.

The doctrine of res judicata prevents relitigation of claims and issues finally determined by a court of competent jurisdiction. The element of the doctrine referred to as res judicata, or claim preclusion, precludes relitigation of the same cause of action in a second suit between the same parties or parties in privity. The element referred to as collateral estoppel, or issue preclusion, precludes relitigation of a previously decided issue in a different cause of action between the same parties or parties in privity. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal. 4th 888, 896; *Levy v. Cohen* (1977) 19 Cal.3d 165, 171.) The purpose of the doctrine is to promote judicial economy by preventing inconsistent

judgments and repetitive litigation that causes "'. . . vexation and expenses to the *parties* and wasted effort and expenses in *judicial administration.*'" (*Mycogen,* at p. 897.)

State courts must give full faith and credit to final orders and judgments of a federal court, apply federal law to determine the scope and preclusive effect of federal orders and judgments the arise from federal question jurisdiction. (*Levy v. Cohen, supra,* 19 Cal.3d at pp. 172-173; *Nathanson v. Hecker* (2002) 99 Cal. App.4th 1158-1163.) Application of the Bankruptcy Code involves federal question jurisdiction. (*Butcher v. Truck Ins. Exchange* (2002) 77 Cal. App.4th 1442, 1452.)

The instant case involves application of collateral estoppel or issue preclusion because the complaints allege causes of action based on a landlord's tort and contractual duties to a tenant whereas the Order adjudicated a right created by the Bankruptcy Code for the purpose of allowing an insolvent debtor to reorder its affairs and achieve "'a new opportunity in life .... unhampered by the pressure and discouragement of preexisting debt'" (*Grogan v. Garner* (1991) 498 U.S. 279, 286; see also *In re Justice Oaks II, Ltd.* (11th Cir. 1990) 898 F.2d 1544, 1550-1551 [causes of action are the same under federal law if they arise from the same transaction or series of transactions].)

In order to have issue preclusion effect, a federal court order or judgment must satisfy four conditions. It must be within the jurisdiction of the court, must be final and on the merits, must have necessarily decided an issue identical to an issue that must be relitigated in the subsequent case, and must involve the same parties or persons in privity with the parties to the subsequent case. (*Syufy Enterprises v. City of Oakland* (2002) 104 Cal. App.4th 869, 878; *In re*

Justice Oaks II, Ltd., supra, 898 F.2d at p. 1550.)

Each of these conditions is satisfied in the instant case. There is no serious dispute that the bankruptcy court had jurisdiction or that the Order is final and on the merits and, based on our prior opinion, that the same persons or their privies are parties to both the bankruptcy proceeding and the instant actions. (*George v. County of San Luis Obispo, supra,* 78 Cal. App.4th at pp. 1053-1054.) Further, we conclude that the Order adjudicated the termination of appellants' possessory interest under the Lease, and that a necessary element of all causes of action alleged in the complaints is that appellants retained the right of possession as the City's tenant even after rejection of the Lease. By terminating appellants' possessory interest, the Order precludes appellants from prevailing on any of these causes of action.

First, as the Ninth Circuit and this court have determined, the bankruptcy court had complete and exclusive jurisdiction to issue the Order because it involved a "core" proceeding created by bankruptcy law to allow a bankrupt to enforce executory contracts and leases beneficial to the estate but reject those that are a financial burden. (*In re George, supra,* 322 F.3d at p. 590; *In re George, supra,* 185 F.3d 866; *George v. County of San Luis Obispo, supra,* 78 Cal. App.4th at p. 1053.) Section 365(d)(4) requires a bankrupt debtor to assume or reject its executory contracts and unexpired leases within 60 days of filing for bankruptcy, and if there is no express assumption or rejection within that time period, the "lease is deemed rejected, and the trustee shall immediately surrender" the leased property to the lessor.

Second, the Order is final because it conclusively

determined a separable dispute in the bankruptcy case and was immediately appealable. (*Sea Harvest Corp. v. Riviera Land Co.* (9th Cir. 1989) 868 F.2d 1077, 1078; *Nathanson v. Hecker, supra,* 99 Cal. App. 4th at p. 1164.) Unlike a typical civil case that is a single judicial unit, a bankruptcy "case is simply an aggregation of individual controversies, the resolution of which must be reached before bankruptcy distribution." (*Nathanson,* at pp.1164-1165.) Ordinary concepts of finality apply to each discrete contested matter once that matter is resolved. (*Ibid.*)

Third, the bankruptcy proceeding involved the same parties, or their privies, to the instant state actions. The Georges opposed the City in the proceedings resulting in the Order and the Georges and the George children are plaintiffs in the instant complaints. As previously determined, the George children are in privity with the Georges because the rights of the George children arise from and are dependent on their parents' leasehold interest. (*George v. County of San Luis Obispo, supra,* 78 Cal. App.4th at pp. 1053-1054.) The Order expressly binds the George children for this reason and because they had notice of and an opportunity to be heard in the bankruptcy proceedings. (*Ibid.*)

Fourth, the complaints would necessarily require relitigation of the issues adjudicated by the Order. The Order litigated the rejection of the Lease and the requirement that the George children immediately surrender possession of the leased property to the City. It is unsettled whether a lease rejection terminates the lease in its entirety or, at least as to the rights of certain third parties, operates merely as a breach of the lease. (See, e.g., *Syufy Enterprises v. City of Oakland, supra,* 104 Cal. App.4th at pp. 880-881; see also *McLaughlin v. Walnut Properties, Inc.* (2004) 119 Cal. App.4th 293, 296-303.)

But, there is no doubt about the effect of a lease rejection on the bankrupt tenant's possessory interest.

The Order determined that appellants' right to possession of the premises and their right to operate a business on the leased property based on a landlord-tenant relationship terminated as a matter of law when the 60-day period to assume or reject the lease expired. (*In re Elm Inn, Inc.* (9th Cir. 1991) 942 F.2d 630, 633; *Sea Harvest Corp. v. Riviera Land Co., supra*, 868 F.2d at pp. 1080-1081; see also *Syufy Enterprises v. City of Oakland, supra*, 104 Cal.App.4th at pp. 880-881.) And, the City's right to take possession of the leased property accrued simultaneously with the termination of appellants' right. (*In re Elm Inn, Inc.*, at p. 633; *Sea Harvest Corp.*, at pp. 1080-1081.) As stated by the Ninth Circuit in affirming the Order, the City was entitled to find new tenants for the property. (*In re George, supra*, 185 F.3d 866.)

Furthermore, the Order also adjudicated the equitable claims made by the Georges in resisting the Lease rejection by determining that there was no misconduct by the City. Determination of such equitable claims is within the jurisdiction of the bankruptcy court and final. Bankruptcy courts have broad and preemptive authority to resolve questions of whether rejection of a lease is equitable under the circumstances of a particular case. (*In re Elm Inn, Inc., supra*, 942 F.2d at p. 635.)

The complaints reassert the positions taken by the Georges in the bankruptcy that were categorically rejected by the bankruptcy court and rejected time and again on appeal. The essential elements of the theories of liability alleged in the complaints are that, *after the Lease rejection,* appellants retained a tenant's possessory interest in the leased property, and that the City acted

tortiously and in breach of the Lease when it took possession. Contrary to appellants' assertion, there is no legal support for the proposition that a bankrupt tenant retains possessory and related rights after a lease has been rejected under section 365(d)(4). (See *Syufy Enterprises v. City of Oakland, supra,* 104 Cal. App.4th at 885-886.)

Specifically, the first cause of action for "breach of contract and statutory duty" alleges that the City discriminated against the Georges in violation of the tidelands trust doctrine. (See *State of Cal. Ex rel. State Lands Com. v. Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 63-64 [the state holds tidelands in trust for the purposes of navigation, commerce, and recreation].) As appellants expressly acknowledge in their briefs, in substance this cause of action challenges the Order by relying on City conduct and events after the Lease rejection and is inseparable from the matters resolved in the Order. In addition, the cause of action is fatally deficient because it fails to allege any "discrimination" by the City with respect to public use of the tidelands (waterfront) portion of the leased property for navigation, commerce, or recreation. (Cf. *City of Long Beach v. Marshall* (1938) 11 Cal.2d 609, 614.)

The second cause of action for "trespass, conversion and inverse condemnation" challenges the Order by alleging that the City's entry onto the premises and collection of subtenant rent *after the Lease rejection* constituted trespass, conversion and the taking of private property without compensation. Similarly, the third cause of action for "breach of implied covenant of good faith and fair dealing" alleges that the City breached its duty to recognize appellants as tenants in lawful possession *after the Lease rejection.* And, the forth cause of action

for "intentional interference with performance of contract and breach of third party beneficiary contract" alleges that the City evicted appellants and collected subtenant rent *after the Lease rejection.*

The fourth and fifth causes of action also allege that appellants' possessory interest was "reinstated" by an October 1995 agreement between the City and the Georges' lender that settled the City's lawsuit to enjoin the lender's foreclosure of its security interest in the leased property. There is no factual basis alleged in the complaint or suggested by the agreement or the record as a whole that supports appellants' legal conclusion that the lender's enforcement of its security interest reinstated appellants' possessory interest in the Lease or had any effect on the Order or appellants' rights against the City. The record shows that, by obtaining relief from the automatic stay, the bankruptcy court acknowledged the lender's right to foreclose on its security without affecting appellants' rights under the Lease. (*In re George, supra,* 185 F.3d 866; see §362.)

Appellants rely heavily on the fact that the state law claims in the adversary proceeding were dismissed without prejudice, and assert that such a dismissal preserved appellants' state law claims for litigation in state court. We agree that dismissal of state law claims without prejudice permits state court prosecution of any viable state law claim that does not conflict with the Order. But, the preservation of state law claims unrelated to the Order does not permit the prosecution of state law claims that require relitigation of the same issues adjudicated by the Order.

Conclusion

The Bankruptcy Code creates a system designed to

adjust all of the rights and duties of bankrupt debtors and their creditors. While bankruptcy law defers to state law at many points, the determination of rights and duties within the bankruptcy process is uniquely and exclusively federal. Congress did not intend to permit state remedies to be imposed on activities that are necessarily undertaken in the bankruptcy process. (*MSR Exploration, Ltd. V. Meridian Oil, Inc.* (9th Cir. 1996) 74 F.3d 910, 914; *Satten v. Webb, supra,* 99 Cal. App.4th at pp. 376-377.) Here, appellants aggressively resisted orders made by the bankruptcy court between 1995 and 1997. After repeated failure in this effort, appellants cannot relitigate the same battle in state court.

The judgment is affirmed. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.
YEGAN, J.

Martin J. Tangeman, Judge

Superior Court County of San Luis Obispo

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

JAMES F. GEORGE, III, and MARGIE GEORGE, Plaintiffs, v. CITY OF MORRO BAY, and DOES 1 through 50, inclusive, Defendants.	CASE NO. CV 081219 Judge: Honorable Martin Tangeman JUDGMENT (Filed June 10, 2003) Date: March 20, 2003 Dept.: Veteran's Building
JAMES F. GEORGE, IV, MARY GEORGE, JOHN GEORGE, v. CITY OF MORRO BAY, and DOES 1 through 50, Inclusive, Defendants.	CASE NO. CV 081221 Judge: Honorable Martin Tangeman JUDGMENT (Filed June 10, 2003) Date: March 20, 2003 Dept., Veteran's Building

This cause came on regularly for hearing on Defendant City of Morro Bay's Demurrer to the First Amended Complaint of Plaintiffs James F. George, IV, Mary George and John George. The Honorable Martin J. Tangeman presided over the matter. Plaintiffs appeared through attorney Shane Kramer. Defendant appeared through attorney J. Christine Dietrick.

On March 20, 2003, the Court issued an "Order sustaining Defendant City of Morro Bay's Demurrer to the First Amended Complaint. Therein, the Court found that the causes of action stated in the First Amended Complaint were causes of action which either could have been litigated in previous lawsuits between the same parties, or were in fact litigated in prior lawsuits between the parties. Therefore, the Court found that these claims were barred by the doctrines of res judicata and/or collateral estoppel.

The Court also found that even if causes of action for conversion and interference with performance of a contract were not barred by res judicata or collateral estoppel, they were barred by plaintiffs' failure to file timely tort claims with the City of Morro Bay. The Court thus sustained the City of Morro Bay's Demurrer without leave to amend.

It is therefore adjudged and ordered that judgment be entered in favor of Defendant City of Morro Bay, and that defendant is awarded costs of suit. The Court's March 20, 2003 Order is incorporated by reference into this judgment.

Dated: June 10, 2003

/s/ Martin J. Tangeman
Martin J. Tangeman
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

JAMES F. GEORGE, III, and MARGIE GEORGE, PLAINTIFFS, vs. CITY OF MORRO BAY, et al., DEFENDANTS.	NO. CV 081219
JAMES F. GEORGE, IV, MARY GEORGE, and JOHN GEORGE, PLAINTIFFS, vs. CITY OF MORRO BAY, et al., DEFENDANTS.	NO. CV 081221 ORDER SUSTAINING DEFENDANT CITY OF MORRO BAY'S DEMURRERS WITHOUT LEAVE TO AMEND (Filed March 20, 2003)

Defendant's Demurrers to Plaintiffs' First Amended Complaints filed in each of the above-entitled actions came on regularly for hearing on January 28, 2003. Plaintiffs in both actions appeared through attorney Shane Kramer. Defendant City of Morro Bay appeared through its attorney J. Christine Dietrick of Hunt & Associates.

The Court, having read all of the papers submitted by the parties, including any admissible evidence submitted

therewith, and having listened to the oral arguments of counsel, enters its order sustaining the City of Morro Bay's Demurrers to both First Amended Complaints without leave to amend.

Plaintiffs filed these actions in September 1997, alleging that Defendant breached a lease agreement leasing water-front property to them. Both First Amended Complaints assert the same claims. Plaintiffs in CV 081221 assert their claims on the basis of their 40% interest in the leasehold and business operated by their parents, who are the Plaintiffs in CV 081219.

Plaintiffs filed their amended complaints in October 1997. The City filed demurrers in December 1997. On January 30, 1998, the Court stayed both cases due to a pending bankruptcy action without ruling on the demurrers.

On September 4, 2002, the Court ordered the stay lifted. In October 2002, the City filed demurrers, essentially restating the arguments asserted in the first demurrers. The City argues: (1) that Plaintiffs are barred by res judicata and/or collateral estoppel from asserting their claims because the factual and legal basis for the claims had been adjudicated against them in the course of the bankruptcy proceedings and other state court actions filed in this Court; and (2) any remaining claims are barred for failure to file a timely government tort claim.

The Bankruptcy Court determined that Plaintiffs failed to assume the lease for the subject property after Plaintiffs had filed for bankruptcy, as required by 11 U.S.C. § 365(d)(4). After its initial determination to that effect, Plaintiffs filed an appeal which resulted in a

remand to the Bankruptcy Court for factual findings on the issue of a possible waiver of the City's rights. On remand, the Bankruptcy Court made findings on the waiver issue, finding no waiver, and again granted the City's motion for surrender of the property based upon failure to timely assume the lease. Plaintiffs unsuccessfully appealed from that decision.

After careful consideration of the long and extended history of litigation between Plaintiffs and the City of Morro Bay, including orders and decisions previously made in various court actions affecting the rights of the parties, this Court finds that the claims asserted in these lawsuits are barred by res adjudicata and/or collateral estoppel, because the underlying facts and legal points have previously been determined in the City's favor. Further, to the extent the issues raised by the tort claims (the Second Cause of Action for Conversion and the Fourth Cause of Action for Interference with Performance of a Contract) were not resolved in the various underlying State and Federal proceedings, they are barred because of Plaintiffs' failure to submit timely tort claims.

Accordingly, Defendant City of Morro Bay's Demurrers to Plaintiffs' First Amended Complaints, filed in both of the above actions, are sustained without leave to amend. Defendants are directed to prepare proposed judgments based on this order. Defendants shall recover their costs of suit.

Dated: March 20, 2003

/s/Martin J. Tangeman
MARTIN J. TANGEMAN
JUDGE OF THE SUPERIOR COURT

Court of Appeals, Second Appellate District, Division Six
Nos. B169180/B169264
S130295

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JAMES F. GEORGE III et al., Plaintiffs and Appellants,

v.

CITY OF MORRO BAY, Defendant and Respondent;
and Companion case.

Petition for review DENIED.

SUPREME COURT
FILED
FEB. 16, 2005

Frederick K. Ohirich Clerk
DEPUTY

GEORGE
Chief Justice

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JAMES F.GEORGE, III, & MARGIE R. GEORGE, Debtors.	NO. 97-55628 DC NO. CV-97-01463-ER MEMORANDUM[1]
JAMES F. GEORGE, III; MARGIE R. GEORGE, Appellants, v. CITY OF MORRO BAY; SANTA LUCIA NATIONAL BANK; WILHELM HOPPE; TINA HOPPE; GORDON HELD; JULIA HELD, Appellees.	(Filed May 24, 1999)

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding
Argued and Submitted April 12, 1999
Pasadena, California

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: D.W. NELSON, FERNANDEZ, and W. FLETHCER, Circuit Judges.

Chapter 11 debtors, James F. George, III, and Margie R. George ("the Georges") appeal the district court's order affirming the bankruptcy court's rulings. The bankruptcy court found that the Georges rejected their lease with the City of Morro Bay ("the City") under 11 U.S.C. § 365(d)(4) and that the City did not waive the right to assert that the lease had been rejected.

We address the issues of whether this agreement was a lease under Section 365(d)(4) as well as the applicability of the equitable doctrines of waiver and estoppel in a published opinion filed concurrently with this memorandum disposition. In that opinion, we hold that this agreement is a lease under Section 365(d)(4). Furthermore, we conclude that we need not decide whether the doctrines of waiver and estoppel apply to Section 365. In this case, the City did not intend to waive its rights under Section 365 nor are there any grounds for estoppel. We resolve the remaining issues in this memorandum. The parties are familiar with the facts of the case and we discuss them only as necessary to explain our reasoning.

Issues of jurisdiction and standing are subject to de novo review by this court. *See Liberty Mutual Ins. Co. v Official Unsecured Creditors' Comm. of Spaulding Composites Co. (In re Spaulding Composites Co., Inc.)*, 207 B.R. 899, 902 (B.A.P. 9th Cir. 1997).

I. Issues Not Raised to the District Court

Arguing against the surrender order on a variety of grounds, the Georges raise several issues to this court that they did not raise to the district court. Specifically, the

Georges argue that applying Section 365(d)(4) to the lease violates their constitutional rights. Furthermore, the Georges argue that California's anti-forfeiture statutes dictate against the surrender order.

The Georges raised the constitutional issues to the bankruptcy court for the first time in their motion for reconsideration. The bankruptcy court ruled that the arguments were not timely made and did not consider them on the merits. Furthermore, the Georges did not raise these issues to the district court. Similarly, there is no evidence in the record that the Georges raised the anti-forfeiture argument to either the bankruptcy court or the district court.

Ninth Circuit law is clear that except in cases involving jurisdictional questions or where particular circumstances suggest that injustice might otherwise result or that public policy requires, "this court declines to consider arguments for reversal that were not presented in the district court." *Ratanasen v. California Dept. of Health Serv.*, 11 F.3d 1467, 1473 (9th Cir. 1993). These exceptions do not apply in this case. Therefore, we refuse to hear these arguments.

II. Standing

The Georges also argue that the City does not have standing to bring a motion for surrender of the property because it did not suffer any harm. This argument fails for two reasons. First, this circuit has expressly determined in the context of Section 365(d)(4) rejections that it is appropriate for lessors to bring actions for surrender orders within the bankruptcy case. *See Anderson v. Elm Inn, Inc. (In re Elm Inn)*, 942 F.2d 630, 634 (9th Cir. 1991). Second, the City as the lessor of the property has a substantial interest in having appellants removed from the leasehold so it can find new tenants.

III. Third Party Interest

Next, the Georges argues that the surrender order was inappropriate because it affected the interest of third parties. They argue that the interest of their children, Santa Lucia National Bank, and Mildred Dennis were adversely affected by the surrender order. We agree with the district court, however, that the Georges have not shown that they have standing to assert the rights of non-parties. Therefore, this argument also fails.

IV. State Law

Finally, the Georges claim that the surrender order made determinations that are properly made only under state law. As the district court found, however, it was not state law that deprived the Georges of their leasehold interest. Rather, it was the provisions of 11 U.S.C. § 365(d)(4), which is a core bankruptcy matter. Therefore, we find that there is no right to a state court trial or jury.

AFFIRMED.